

ASSEMBLY BILL

No. 1246

Introduced by Assembly Member Aghazarian

February 21, 2003

An act to amend Sections 25185 and 25187 of the Health and Safety Code, relating to hazardous waste.

LEGISLATIVE COUNSEL'S DIGEST

AB 1246, as introduced, Aghazarian. Administrative penalties: analysis.

(1) Under existing law, the Department of Toxic Substances Control or a unified program agency is authorized to issue an order requiring a violation be corrected and imposing an administrative penalty when there is a violation of the hazardous waste control laws, laws regulating hazardous substances, or any permit, rule, regulation, standard, or requirement issued or adopted pursuant to those laws. Existing law authorizes a representative of the department or local officer or agency designated by the department to conduct specified enforcement inspections and requires the preparation of an inspection report, including holding a specified meeting with the operator of the facility regarding the inspection report, upon the request of the operator.

This bill would require the department or local officer or agency to provide, upon the request of the operator, a copy of a specified analysis of any proposed administrative penalty in a meeting held with the operator regarding an inspection report. The bill would require, if an analysis has not been prepared at the time of the meeting, that the department or officer or agency provide a copy to the operator of the analysis before, or at the same time that, the department or officer or agency makes a proposal to impose administrative penalties. The bill

would require the department or officer or agency to meet and confer with the operator, upon the request of the operator, regarding entering into a settlement before issuing any order or filing any judicial action that imposes an administrative or civil penalty. The bill would make conforming changes.

The bill would impose a state-mandated local program by imposing new duties upon unified program agencies with regard to the enforcement of hazardous waste control laws.

(2) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. (a) The Legislature finds and declares all of the
2 following:

3 The Department of Toxic Substances Control has adopted
4 regulations, found in Article 3 (commencing with Section
5 66272.60) of Article 3 of Chapter 22 of Division 4.5 of Title 22 of
6 the California Code of Regulations, governing the manner in
7 which it calculates appropriate administrative penalties for
8 violations of the hazardous waste control laws.

9 (b) The department's policy of sharing only a final penalty
10 demand number with owners and operators, but refusing to share
11 its penalty calculations, results in a lack of dialogue and
12 understanding that undermines communication and settlement
13 opportunities by allowing a dialogue only about final settlement
14 numbers rather than issues regarding the gravity of a violation.

15 (c) It is in the public interest, the interest of preserving scarce
16 state resources, and the interest of providing due process, to
17 require the department to share its penalty calculations and meet
18 with regulated businesses in an effort to resolve enforcement
19 penalty issues short of litigation.

20 SEC. 2. Section 25185 of the Health and Safety Code is
21 amended to read:



25185. (a) In order to carry out the purposes of this chapter, any authorized representative of the department or the local officer or agency authorized to enforce this chapter pursuant to subdivision (a) of Section 25180, may, at any reasonable hour of the day, or as authorized pursuant to Title 13 (commencing with Section 1822.50) of Part 3 of the Code of Civil Procedure, do any of the following:

(1) Enter and inspect a factory, plant, construction site, disposal site, transfer facility, or any establishment or any other place or environment where hazardous wastes are stored, handled, processed, disposed of, or being treated to recover resources.

(2) Carry out any sampling activities necessary to carry out this chapter, including obtaining samples from any individual or taking samples from the property of any person or from any vehicle in which any authorized representative of the department or the local officer or agency authorized to enforce this chapter pursuant to subdivision (a) of Section 25180 reasonably believes has transported or is transporting hazardous waste. However, upon request, split samples shall be given to the person from whom, or from whose property or vehicle, the samples were obtained.

(3) Stop and inspect any vehicle reasonably suspected of transporting hazardous wastes when accompanied by a uniformed peace officer in a clearly marked vehicle.

(4) Inspect and copy any records, reports, test results, or other information required to carry out this chapter.

(5) Photograph any waste, waste container, waste container label, vehicle, waste treatment process, waste disposal site, or condition constituting a violation of law found during an inspection.

(b) During the inspection, the inspector shall comply with all reasonable security, safety, and sanitation measures. In addition, the inspector shall comply with reasonable precautionary measures specified by the operator.

(c) (1) At the conclusion of the inspection, the inspector shall deliver to the operator of the facility or site a written summary of all violations alleged by the inspector. The inspector shall, prior to leaving the facility or site, deliver the written summary to the operator and shall discuss any questions or observations that the operator might have concerning the inspection.

1 (2) (A) The department or the local officer or agency
2 authorized to enforce this chapter pursuant to subdivision (a) of
3 Section 25180 shall prepare an inspection report ~~which~~ *that* shall
4 fully detail all observations made at the facility or site, all alleged
5 violations, the factual basis for alleging those violations, and any
6 corrective actions that should be taken by the operator of the
7 facility or site. The department or the local officer or agency shall
8 provide a copy of the inspection report to the operator within five
9 days from the date of the preparation of the inspection report, ~~and,~~
10 ~~in any event,~~ *but* not later than 65 days from the date of the
11 inspection. The inspection report shall include all pertinent
12 information, including, but not limited to, documents,
13 photographs, and sampling results concerning the alleged
14 violations. The department or the local officer or agency shall
15 provide this information to the operator with the inspection report,
16 including all photographs taken by the department in the course of
17 the inspection and all laboratory results obtained as a result of the
18 inspection. If sampling or laboratory results are not available at the
19 time that the inspection report is prepared, that fact shall be
20 contained in the report. Those results shall be provided to the
21 operator within 10 working days of their receipt by the department
22 or the local officer or agency.

23 (B) The time period required by subparagraph (A) may be
24 extended as a result of a natural disaster, inspector illness, or other
25 circumstances beyond the control of the department, or the local
26 officer or agency, if the department or the local officer or agency
27 so notifies the operator within 70 days from the date of the
28 inspection and provides the inspection report to the operator in a
29 timely manner after the reason for the delay is ended.

30 (C) Information from the inspection report, or the report itself,
31 may be withheld by the department or the local officer or agency
32 if necessary to a criminal investigation or other ongoing
33 investigation in which the department or the local officer or agency
34 determines, in writing, that disclosure of the information will
35 result in a substantial probability of destruction of evidence,
36 intimidation of witnesses, or other obstruction of justice.

37 (D) The department or the local officer or agency shall, at the
38 operator's request, discuss the inspection report with the operator
39 and shall, upon the request of the operator, review the inspection
40 report and determine whether the operator's responses and



documented or proposed corrective actions would be sufficient to comply with this chapter, or if any allegation of a violation is unwarranted.

(3) The operator of the site or facility ~~which~~ *that* receives an inspection report pursuant to paragraph (2) shall submit a written response to the department or the local officer or agency authorized to enforce this chapter pursuant to subdivision (a) of Section 25180 within 60 days of receipt of the inspection report, or within a shorter time as the department or the local officer or agency may reasonably require, which shall include a statement documenting corrective actions taken by the operator or proposing corrective actions ~~which~~ *that* will be taken by the operator, for purposes of compliance with this chapter, or disputing the existence of the violation. Upon receiving the written response from the operator, the department or the local officer or agency shall, upon the request of the operator, meet and confer with the operator regarding any questions, concerns, or comments that the operator may have concerning the inspection report. The department or the local officer or agency shall, within 30 working days from the date of receipt of a response ~~which~~ *that* documents or proposes corrective action, or ~~which~~ *that* disputes the existence of a violation, determine whether the corrective actions documented or proposed to be taken by the operator, if implemented as stated or proposed, will achieve compliance with this chapter, or whether a violation is still alleged, as applicable, and shall submit a written copy of that determination to the operator, in the form of a report of violation or other appropriate document. If the department or the local officer or agency fails to make the determination and submit a copy of the determination within 30 working days from the date of receipt of the operator's response, the department or the local officer or agency may not seek penalties for continuing violations or any alleged new violations caused by the corrective actions taken by the operator, until the department or the local officer or agency submits the determination to the operator and provides the operator with a reasonable time in which to make necessary operational modifications—~~which~~ *that* differ from those proposed to the department or local officer or agency.

(4) (A) *The department or local officer or agency shall provide to the operator, upon the request of the operator, a copy of its*

1 *analysis of any appropriate administrative penalty that will be*
2 *proposed pursuant to Section 25187, in any meeting held with an*
3 *operator pursuant to paragraph (3). The analysis shall*
4 *demonstrate that the department's or local officer or agency's*
5 *proposed administrative penalty complies with the department's*
6 *regulations for imposing an administrative penalty.*

7 *(B) If an analysis has not been prepared at the time of the*
8 *meeting held pursuant to paragraph (3), the department or local*
9 *officer or agency shall provide a copy to the operator of the*
10 *analysis before, or at the same time that, the department or local*
11 *officer or agency makes a proposal to impose administrative*
12 *penalties upon the operator.*

13 *(C) After providing a copy of the analysis, and upon the request*
14 *of the operator, the department or local officer or agency shall*
15 *meet and confer with the operator regarding entering into a*
16 *settlement as to the penalty, before issuing any order pursuant to*
17 *Section 25187 or filing any judicial action pursuant to this article*
18 *that imposes an administrative or civil penalty.*

19 *(D) This paragraph does not require the production of*
20 *investigative or security files compiled by any state or local agency*
21 *for correctional, law enforcement, or licensing purposes.*

22 *(d) Whenever information, including, but not limited to,*
23 *documents, photographs, and sampling results, has been gathered*
24 *pursuant to subdivision (a), the department or the local officer or*
25 *agency shall comply with all procedures established pursuant to*
26 *Section 25173 and shall notify the person whose facility was*
27 *inspected prior to public disclosure of the information, and, upon*
28 *request of that person, shall submit a copy of any information to*
29 *that person for the purpose of determining whether trade secret*
30 *information, as defined in Section 25173, or facility security*
31 *would be revealed by the information. "Public disclosure," as*
32 *used in this section, shall not include review of the information by*
33 *a court of competent jurisdiction or an administrative law judge.*
34 *That review may be conducted in camera at the discretion of the*
35 *court or judge.*

36 SEC. 3. Section 25187 of the Health and Safety Code is
37 amended to read:

38 25187. (a) (1) The department or a unified program agency,
39 in accordance with subdivision (l), may issue an order requiring
40 that the violation be corrected and imposing an administrative

penalty, for any violation of this chapter or any permit, rule, regulation, standard, or requirement issued or adopted pursuant to this chapter, whenever the department or Unified Program Agency determines that a person has violated, is in violation of, or threatens, as defined in subdivision (e) of Section 13304 of the Water Code, to violate, this chapter or Chapter 6.8 (commencing with Section 25300), or any permit, rule, regulation, standard, or requirement issued or adopted pursuant to this chapter or Chapter 6.8 (commencing with Section 25300).

(2) In an order proposing a penalty pursuant to this section, the department or Unified Program Agency shall take into consideration the nature, circumstances, extent, and gravity of the violation, the violator's past and present efforts to prevent, abate, or clean up conditions posing a threat to the public health or safety or the environment, the violator's ability to pay the proposed penalty, and the prophylactic effect that the imposition of the proposed penalty would have on both the violator and the regulated community as a whole. *The department or Unified Program Agency shall take the actions required in paragraph (4) of subdivision (c) of Section 25185 before issuing an order proposing a penalty.*

(b) The department or a unified program agency, in accordance with subdivision (l), may issue an order requiring corrective action whenever the department or Unified Program Agency determines that there is or has been a release, as defined in Chapter 6.8 (commencing with Section 25300), of hazardous waste or constituents into the environment from a hazardous waste facility.

(1) In the case of a release of hazardous waste or constituents into the environment from a hazardous waste facility that is required to obtain a permit pursuant to Article 9 (commencing with Section 25200), the department shall pursue the remedies available under this chapter, including the issuance of an order for corrective action pursuant to this section, before using the legal remedies available pursuant to Chapter 6.8 (commencing with Section 25300), except in any of the following circumstances:

(A) Where the person who is responsible for the release voluntarily requests in writing that the department issue an order to that person to take corrective action pursuant to Chapter 6.8 (commencing with Section 25300).



1 (B) Where the person who is responsible for the release is
2 unable to pay for the cost of corrective action to address the
3 release. For purposes of this subparagraph, the inability of a person
4 to pay for the cost of corrective action shall be determined in
5 accordance with the policies of the Environmental Protection
6 Agency for the implementation of Section 9605 of Title 42 of the
7 United States Code.

8 (C) Where the person responsible for the release is unwilling
9 to perform corrective action to address the release. For purposes
10 of this subparagraph, the unwillingness of a person to take
11 corrective action shall be determined in accordance with the
12 policies of the Environmental Protection Agency for the
13 implementation of Section 9605 of Title 42 of the United States
14 Code.

15 (D) Where the release is part of a regional or multisite
16 groundwater contamination problem that cannot, in its entirety, be
17 addressed using the legal remedies available pursuant to this
18 chapter and for which other releases that are part of the regional
19 or multisite groundwater contamination problem are being
20 addressed using the legal remedies available pursuant to Chapter
21 6.8 (commencing with Section 25300).

22 (E) Where an order for corrective action has already been
23 issued against the person responsible for the release, or the
24 department and the person responsible for the release have, prior
25 to January 1, 1996, entered into an agreement to address the
26 required cleanup of the release pursuant to Chapter 6.8
27 (commencing with Section 25300).

28 (F) Where the hazardous waste facility is owned or operated by
29 the federal government.

30 (2) The order shall include a requirement that the person take
31 corrective action with respect to the release of hazardous waste or
32 constituents, abate the effects thereof, and take any other necessary
33 remedial action.

34 (3) If the order requires corrective action at a hazardous waste
35 facility, the order shall require that corrective action be taken
36 beyond the facility boundary, where necessary to protect human
37 health or the environment.

38 (4) The order shall incorporate, as a condition of the order, any
39 applicable waste discharge requirements issued by the State Water
40 Resources Control Board or a California regional water quality

1 control board, and shall be consistent with all applicable water
2 quality control plans adopted pursuant to Section 13170 of the
3 Water Code and Article 3 (commencing with Section 13240) of
4 Chapter 4 of Division 7 of the Water Code and state policies for
5 water quality control adopted pursuant to Article 3 (commencing
6 with Section 13140) of Chapter 3 of Division 7 of the Water Code
7 existing at the time of the issuance of the order, to the extent that
8 the department or Unified Program Agency determines that those
9 plans and policies are not less stringent than this chapter and
10 regulations adopted pursuant to this chapter. The order may
11 include any more stringent requirement that the department or
12 Unified Program Agency determines is necessary or appropriate
13 to protect water quality.

14 (5) Persons who are subject to an order pursuant to this
15 subdivision include present and prior owners, lessees, or operators
16 of the property where the hazardous waste is located, present or
17 past generators, storers, treaters, transporters, disposers, and
18 handlers of hazardous waste, and persons who arrange, or have
19 arranged, by contract or other agreement, to store, treat, transport,
20 dispose of, or otherwise handle hazardous waste.

21 (6) For purposes of this subdivision, “hazardous waste
22 facility” includes the entire site that is under the control of an
23 owner or operator engaged in the management of hazardous waste.

24 (c) Any order issued pursuant to this section shall be served by
25 personal service or certified mail and shall inform the person so
26 served of the right to a hearing. If the Unified Program Agency
27 issues the order pursuant to this section, the order shall state
28 whether the hearing procedure specified in paragraph (2) of
29 subdivision (f) may be requested by the person receiving the order.

30 (d) Any person served with an order pursuant to this section
31 who has been unable to resolve any violation or deficiency on an
32 informal basis with the department or Unified Program Agency
33 may, within 15 days after service of the order, request a hearing
34 pursuant to subdivision (e) or (f) by filing with the department or
35 Unified Program Agency a notice of defense. The notice shall be
36 filed with the office that issued the order. A notice of defense shall
37 be deemed filed within the 15-day period provided by this
38 subdivision if it is postmarked within that 15-day period. If no
39 notice of defense is filed within the time limits provided by this
40 subdivision, the order shall become final.

(e) Any hearing requested on an order issued by the department shall be conducted within 90 days after receipt of the notice of defense by an administrative law judge of the Office of Administrative Hearings of the Department of General Services in accordance with Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code, and the department shall have all the authority granted to an agency by those provisions.

(f) Except as provided in subparagraph (B) of paragraph (2), a person requesting a hearing on an order issued by a unified program agency may select the hearing process specified in either paragraph (1) or (2) in the notice of defense filed with the Unified Program Agency pursuant to subdivision (d). Within 90 days of receipt of the notice of defense by the Unified Program Agency, the hearing shall be conducted using one of the following procedures:

(1) An administrative law judge of the Office of Administrative Hearings of the Department of General Services shall conduct the hearing in accordance with Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code.

(2) (A) A hearing officer designated by the Unified Program Agency shall conduct the hearing in accordance with Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code, and the Unified Program Agency shall have all the authority granted to an agency by those provisions. When a hearing is conducted by a unified program agency pursuant to this paragraph, the Unified Program Agency shall, within 60 days of the hearing, issue a decision.

(B) A person requesting a hearing on an order issued by a unified program agency may select the hearing process specified in this paragraph in a notice of defense filed pursuant to subdivision (d) only if the Unified Program Agency has, as of the date the order is issued pursuant to subdivision (c), selected a designated hearing officer and established a program for conducting a hearing in accordance with this paragraph.

(g) The hearing decision issued pursuant to subdivision (f) shall be effective and final upon issuance. Copies of the decision shall be served by personal service or by certified mail upon the

1 party served with the order and upon other persons who appeared
2 at the hearing and requested a copy.

3 (h) Any provision of an order issued under this section, except
4 the imposition of an administrative penalty, shall take effect upon
5 issuance by the department or Unified Program Agency if the
6 department or Unified Program Agency finds that the violation or
7 violations of law associated with that provision may pose an
8 imminent and substantial endangerment to the public health or
9 safety or the environment, and a request for a hearing shall not stay
10 the effect of that provision of the order pending a hearing decision.
11 However, if the department or Unified Program Agency
12 determines that any or all provisions of the order are so related that
13 the public health or safety or the environment can be protected
14 only by immediate compliance with the order as a whole, then the
15 order as a whole, except the imposition of an administrative
16 penalty, shall take effect upon issuance by the department or
17 Unified Program Agency. A request for a hearing shall not stay the
18 effect of the order as a whole pending a hearing decision.

19 (i) A decision issued pursuant to this section may be reviewed
20 by the court pursuant to Section 11523 of the Government Code.
21 In all proceedings pursuant to this section, the court shall uphold
22 the decision of the department or Unified Program Agency if the
23 decision is based upon substantial evidence in the whole record.
24 The filing of a petition for writ of mandate shall not stay any action
25 required pursuant to this chapter or the accrual of any penalties
26 assessed pursuant to this chapter. This subdivision does not
27 prohibit the court from granting any appropriate relief within its
28 jurisdiction.

29 (j) All administrative penalties collected from actions brought
30 by the department pursuant to this section shall be placed in a
31 separate subaccount in the Toxic Substances Control Account and
32 shall be available only for transfer to the Site Remediation
33 Account or the Expedited Site Remediation Trust Fund and for
34 expenditure by the department upon appropriation by the
35 Legislature.

36 (k) All administrative penalties collected from an action
37 brought by a unified program agency pursuant to this section shall
38 be paid to the Unified Program Agency that imposed the penalty,
39 and shall be deposited into a special account that shall be expended

1 to fund the activities of the Unified Program Agency in enforcing
2 this chapter pursuant to Section 25180.

3 (l) The authority granted under this section to a unified
4 program agency is limited to both of the following:

5 (1) The issuance of orders to impose penalties and to correct
6 violations of the requirements of this chapter and its implementing
7 regulations, only when the violations are violations of
8 requirements applicable to hazardous waste generators and
9 persons operating pursuant to a permit-by-rule, conditional
10 authorization, or conditional exemption, when the violations
11 occur at a unified program facility within the jurisdiction of the
12 CUPA.

13 (2) The issuance of orders to require corrective action when
14 there has been a release of hazardous waste or constituents only
15 when the Unified Program Agency is authorized to do so pursuant
16 to Section 25404.1.

17 (m) The CUPA shall annually submit a summary report to the
18 department on the status of orders issued by the unified program
19 agencies under this section and Section 25187.1.

20 (n) The CUPA shall consult with the district attorney for the
21 county on the development of policies to be followed in exercising
22 the authority delegated pursuant to this section and Section
23 25187.1, as they relate to the authority of unified program agencies
24 to issue orders.

25 (o) The CUPA shall arrange to have appropriate legal
26 representation in administrative hearings that are conducted by an
27 administrative law judge of the Office of Administrative Hearings
28 of the Department of General Services, and when a decision issued
29 pursuant to this section is appealed to the superior court.

30 (p) The department may adopt regulations to implement this
31 section and paragraph (2) of subdivision (a) of Section 25187.1 as
32 they relate to the authority of unified program agencies to issue
33 orders. The regulations shall include, but not be limited to, all of
34 the following requirements:

35 (1) Provisions to ensure coordinated and consistent application
36 of this section and Section 25187.1 when both the department and
37 the Unified Program Agency have or will be issuing orders under
38 one or both of these sections at the same facility.

1 (2) Provisions to ensure that the enforcement authority granted
2 to the unified program agencies will be exercised consistently
3 throughout the state.

4 (3) Minimum training requirements for staff of the Unified
5 Program Agency relative to this section and Section 25187.1.

6 (4) Procedures to be followed by the department to rescind the
7 authority granted to a unified program agency under this section
8 and Section 25187.1, if the department finds that the Unified
9 Program Agency is not exercising that authority in a manner
10 consistent with this chapter and Chapter 6.11 (commencing with
11 Section 25404) and the regulations adopted pursuant thereto.

12 (q) Except for an enforcement action taken pursuant to this
13 chapter or Chapter 6.8 (commencing with Section 25300), this
14 section does not otherwise affect the authority of a local agency to
15 take any action under any other provision of law.

16 SEC. 4. No reimbursement is required by this act pursuant to
17 Section 6 of Article XIII B of the California Constitution because
18 a local agency or school district has the authority to levy service
19 charges, fees, or assessments sufficient to pay for the program or
20 level of service mandated by this act, within the meaning of
21 Section 17556 of the Government Code.

